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Supreme Court of the United States

OCTOBER TERM, 1964

No. 686

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

SUNFIRE COAL COMPANY, a corporation, and
ASHLO COAL COMPANY, a corporation

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS,
Partners, d/b/a Elkhorn Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

SUNFIRE COAL COMPANY, a corporation, and
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UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS,
Partners, d/b/a Elkhorn Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (herein called "UMW"), prays that a writ of certiorari issue to review (1) the judgment of the United States Court of Appeals for the Sixth Circuit entered August 20, 1964, in case No. 15,502, styled *Sunfire Coal Company, a corporation, and Ashlo Coal Company, a corporation,* Plaintiffs-Appellees v. *United Mine Workers of America,* Defendant-Appellant, and (2) the judgment of the Sixth Circuit entered on the same date (August 20, 1964), in Case No. 15,503, styled *R. P. Price, C. H. Kelly and Follace Fields,*

Partners, d/b/a Elkhorn Coal Company, Plaintiffs- Appellees v. *United Mine Workers of America,* Defendant-Appellant, in each of which cases the Sixth Circuit affirmed the judgment of the United States District Court for the Eastern District of Kentucky[1] overruling UMW's motion to vacate the final order and judgment and award UMW a new trial in each case because of newly discovered evidence.

A certified appendix record in each case, together with the proceedings in the Sixth Circuit, is furnished herewith in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion, as well as the dissent of Circuit Judge Edwards, appears in Appendix C hereto, pages 10-18a, 18-22a; in each of the certified appendix records; and it is reported in 335 F. 2d 958 (Adv. Op. October 12, 1964).

While separate motions were filed in each case in the district court, the district court's opinion covered both cases. It is found in the *Sunfire* and *Price* certified appendix records (15a).[2] It appears in the Appendix to this Petition (A. 1a, 5a).[3]

JURISDICTION

The Sixth Circuit's judgments affirming the district court was entered in each case August 20, 1964 (A. 22a). This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c).

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[1]The United States Court of Appeals is herein called "Sixth Circuit". The United States District Court for the Eastern District of Kentucky is herein called either "district court" or "trial court".

[2]Where pagination is the same in each of the appendix records, no symbol will precede the page reference. If, however, pagination is different, page references to the *Sunfire* record will be indicated by the symbol "S."; and page references to the *Price* record will be indicated as "P."

[3]The symbol "A." refers to the Appendix to this Petition. Unless otherwise indicated, all emphases herein are supplied.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The original complaints in both *Sunfire* and *Price* invoked district court jurisdiction under Section 303, Labor Management Relations Act, 1947.[3a]

Following judgments against UMW in *Sunfire* (A. 3a) and in *Price* (A. 8a), UMW invoked the district court's jurisdiction to consider UMW's motions for a new trial based upon newly discovered evidence, which are under consideration herein, pursuant to Rule 60(b), Federal Rules of Civil Procedure.

QUESTION PRESENTED

Where, in actions under Section 303, Labor Management Relations Act, 1947, money judgments are entered against a labor union by a federal district court based upon jury verdicts of union responsibility and damages for tortious conduct imputed to the union without proof of the persons guilty thereof or that such persons were union agents, and the union, by motion under Rule 60 (b), Federal Rules of Civil Procedure, seeks a new trial and vacation of the money judgments on the basis of newly discovered evidence, disclosed for the first time more than a year following entry of the judgments in a police officer's affidavit introduced in a public hearing and in which affidavit the officer identifies persons, who were not agents of the union sued, as having committed various tortious acts, some of which were testified to in

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[3a] *Sunfire* originated as Case No. 559 in the district court and became No. 14,832 upon appeal (313 F. 2d 108). The motion to vacate judgment became No. 15,502 upon appeal. Pending appeal and prior to the Sixth Circuit's action thereon, UMW sought, but was denied certiorari, under this Court's Rule 20 (*UMWA* v. *Sunfire Coal Co.*, No. 448, 11 L. ed 2d 166).

Price originated as Case No. 559 in the district court and became No. 15,046 upon appeal (336 F. 2d 771). The motion to vacate judgment therein upon appeal became No. 15,503.

trials in which the money judgments were entered, should the district court wherein the motion is filed apply the provisions of subsection (2) of said Rule 60 (b), which contains a one year limitation, or should it apply subsection (6) of said Rule which has no such time limitation?

STATUTES INVOLVED

28 USCA, Rule 60(b), Federal Rules of Civil Procedure, is involved, and is printed in Appendix D hereto, p. 23a.

STATEMENT OF THE CASE

1. The Judgments Involved

In *Sunfire*, the district court on June 7, 1961, entered judgments aggregating $250,000.00 against UMW in favor of Ashlo and Sunfire (A. 3a), and subsequently denied UMW's post-judgment motions for judgment or new trial (A. 4a).

In *Price*, the district court on October 10, 1961, entered a judgment against UMW in Price's favor for $250,000.00 (A. 7-8a) and subsequently denied similar post-judgment motions (A. 7a).

On May 16, 1963, in *Sunfire* (S. 4a) and on April 22, 1963, in *Price* (P. 4a), UMW filed its "Motion to vacate final judgment and order and award defendant . . . a new trial because of newly discovered evidence". On June 13, 1963, the district court overruled the motions (S. 15a; P. 17a).

2. The Motions to Vacate

From UMW's respective motions (4a et seq.), and the affidavits thereto, it appears:

In *Sunfire's* jury trial, the district court, over UMW objections, had permitted evidence to be introduced to the jury of shootings, of the burning of the Ashlo tipple,

and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who committed such acts and without proving UMW was in any wise connected therewith or was responsible therefor (S. 5a).

Similarly, in *Price's* jury trial, the district court, over UMW objections, permitted the jury to hear evidence of shootings, of the burning of plaintiffs' Kona tipple, and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who committed those acts and without proving UMW's connection therewith or responsibility therefor (P. 5a).[4]

In both *Sunfire* and *Price* (5a), the admitted testimony included that related by Marian Richey (Ritchie) that his three tipples at Sassafras, Viper and Ulvah, Kentucky, burned in July or August, 1959 and he admitted he did not know who burned the tipples. In *Sunfire*, at least seven (S. 5a), and in *Price* at least five (P. 5-6a), other coal operators were permitted to testify concerning property damages at their respective operations without proving who committed such acts.

On *April 3, 1963*, William Perkins furnished to Harrison Combs, of counsel for UMW, a copy of an affidavit of Ira Kilburn, a citizen and resident of Hazard, Perry County, Kentucky, which had been introduced as part of a deposition in a hearing conducted by the City Council of said city, in a proceeding to oust Kilburn as a lieutenant of the Hazard police force (6a, 12a). In the affidavit, Kilburn avows that he has had threats made against his

[4]On October 3, 1964, the Sixth Circuit affirmed the money judgment in *Price* against UMW. The opinion appears at 336 F. 2d 771 (Adv. Op. Nov. 9, 1964). A petition for writ of certiorari therein is presently being prepared for filing in this Court.

life because of knowledge he had of "certain acts" committed during the 1959 strike (8a) and he identifies numerous individuals who, according to his affidavit, destroyed the tipples at Sassafras and Viper, Kentucky, and identifies numerous other persons who, according to said affidavit, engaged in sundry shooting, burning and dynamiting activities during the strike of 1959 (6a, 8a).[5] Kilburn names himself as a participant in three incidents (9a). The persons named in the Kilburn affidavit, as UMW is advised, at the time of the strike in 1959 were neither officers, members, employees nor agents of UMW. Some of the persons so identified were city police officers (12-13a); others were operators in the coal industry (6a, 12a).[6]

Kilburn's affidavit recites that he is "making this statement due to fear for my life and in the event that I should lose my life, I want this statement presented to the Grand Jury for its consideration" (9a).

The notary of the Kilburn affidavit was H. B. Noble, a practicing attorney at Hazard, Kentucky, [and one of UMW attorneys in the cases, *post* p. 20] whose certificate attests that the affidavit was typed by him and that Kilburn "thereafter read the same, and then signed, acknowledged and delivered the same under oath to be true and correct" (10a). While the notary's certificate on the Kilburn affidavit bears date August 10, 1962 (10a), in the April 15, 1963 affidavit of H. B. Noble, attached to the motion to vacate (10-11a), Noble states he was consulted by Kilburn on August 10, 1962; *the consultation was on a professional basis as attorney and client;* and

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[5]The "Kilburn Affidavit" attached to the Motion is found in Appendix C herein, p. 13a, and in both certified appendix records at p. 8a.

[6]Such information to UMW appears in the "Affidavit of William Perkins", which is found in both certified appendix records at p. 8a.

the client "requested prior to the preparation of the affidavit, that I keep secret that which he desired to make known to me"; and that "with this understanding" between them, the Kilburn affidavit was prepared (10-11a). Noble further avows (11a), consistent with the recitations of the Kilburn affidavit (9a), that when Kilburn's affidavit was prepared "the said Ira Kilburn informed" Noble "he had had threats made against his life and that he was afraid for his life and that he wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration" (11a). According to Noble, he "maintained the trust" placed in him by Kilburn and that "the same was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4) [11a].[7]

In William Perkins' affidavit, Perkins avows he first learned of the Kilburn affidavit on March 22, 1963, after the local radio station had carried a news item about the hearing which had been held by Hazard's Board of Commissioners, on charges filed against Kilburn as a member of the City Police force; that the news item stated an affidavit had been filed during the hearing which implicated a number of people as having participated in events occurring during 1959; that he (Perkins) then contacted attorney Combs and advised him of the news item; and that he later saw a copy of the affidavit filed in the hearing (12a).[8]

As the Motion asserts, in the absence of direct evidence

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[7]See "Noble Affidavit" in both certified appendix records, p. 10a.

[8]Attached to William Perkins' affidavit is a copy of the Ira Kilburn affidavit (13a), which Perkins states is a copy filed "at the time of the hearing before The Board of Commissioners of the City of Hazard, Kentucky on March 21st, 1963" (13a).

that UMW agents were responsible for property damages, the jury verdict and judgments based thereon necessarily resulted from unwarranted inferences arising from picketing activities; and if statements in the Kilburn affidavit are true, then statements therein and in the Perkins affidavit demonstrate that persons with no connection or agency with UMW engaged in activities of a character similar to those in the record and which persons are charged with committing some acts for which the jury held UMW liable and who could be found in a court proceeding to have committed the other activities attributed to and imputed to and imputed to UMW without supporting evidence (7a).

The motion also asserts the matters presented are material and relevant and are not cumulative of evidence in the record; that "they have only recently been made available to UMW" which should be given the opportunity of presenting such matters in a new trial in the district court; and that if the motion be granted, UMW intends to subpoena Kilburn as a witness in the new trial to examine him concerning statements contained in his affidavit (6-7a).

3. Plaintiffs' Responses to UMW's Motions to Vacate

Neither in Sunfire nor in Price did plaintiffs therein file any counter-affidavits.

In responses to UMW's Motions (13-14a), plaintiffs asserted that "The motion is based upon Rule 60(b)(2). The Rule provides that such motion must be made 'not more than one year after the judgment, order, or proceeding was entered or taken.'" The responses also showed that in *Sunfire* and in *Price* (14a) that judgments were taken in said cases on June 7, 1961, and October 10, 1961,

respectively, by reason whereof UMW is "therefore barred by the Rule under which it is proceeding".[9]

4. The District Court's Memorandum and Orders

In its Memorandum, the district court rejected UMW's contention that Rule 60(b)(6), Federal Rules of Civil Procedure, governs (A. 2-3a). It sustained plaintiffs' contention, declaring that the district court "is convinced that the defendant's motion comes too late to claim relief under Rule 60(b)" (A. 2a). It reasoned that, "Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence", adding, "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions" (A. 2a). It professed that "The sixth subdivision of Rule 60(b) is by its very language limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions" (A. 3a), citing *Klapprott* v. *United States*, 335 U.S. 601 (1949); *Federal Deposit Insurance Corp.* v. *Alker*, 3 Cir., 234 F. 2d 113 (1956); *United States* v. *Karahalias*, 2 Cir., 205 F. 2d 331 (1953); *Federal Deposit Insurance Corp.* v. *Alker*, E. D. Pa., 30 F.R.D. 527 (1962); *Davis* v. *Wadsworth Construction Co.*, E. D. Pa., 27 F.R.D. 1 (1961). On June 13, 1963 the district court overruled UMW's motions (S. 15a, P. 17a).

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[9]Other grounds of objection asserted by plaintiffs were that defendant made no showing of diligence in trying to discover or produce Kilburn as a witness upon the trial; the material proffered in support of UMW's motion would not be competent or admissible; the alleged factual matter is merely collateral to the main issues in the case; and "evidence which defendant apparently hopes it could adduce upon a second trial is not of such a nature as would probably change the outcome", but is cumulative (13-14a).

5. The Sixth Circuit's Majority and Dissenting Opinions

Upon appeal, heard by a panel of three Circuit Judges, the Sixth Circuit (Circuit Judge Edwards dissenting) affirmed the district court (A. 22a), rejected UMW's position that *Klapprott* v. *U. S.*, 335 U. S. 601, challenged the district court's holding that UMW's motion was subject to the one-year time limitation of Rule 60(b)(2) rather than Rule 60(b)(6), and declared that "All that defendant's motions seek is the opportunity to put Kilburn on the stand at a retrial, or to examine him to discover new evidence to be used on a retrial" (A. 17a).

Circuit Judge Edwards disagreed that "the stringencies of Federal Rules of Civil Procedure require the federal courts to leave in limbo the astonishing charges upon which these motions were based" (A. 18a).

The majority opinion premises its conclusion upon (a) that UMW's motion and supporting affidavits do not assert that *Sunfire* or *Price* witnesses swore falsely or (b) that plaintiffs committed fraud by suing for injuries of their own doing or knowingly used false testimony (A. 17a).

But, Circuit Judge Edwards' dissent appropriately notes that in *Sunfire* and in *Price*, "many acts of violence, destruction and depredation were committed, most of them by *unnamed and unidentified personages, but attributed by plaintiffs, and ultimately by the juries, to*" UMW (A. 18a), that "two episodes of burnings at Ritchie's Tipples were the subject of testimony by Ritchie" in both cases and therein the trial court charged the jury in substance that such testimony could be considered as part of a pattern of violence which occurred during the course of the strike, which *Sunfire* and *Price* attributed to UMW (A. 20a); and that the Kilburn affidavit, if believed, sug-

gests the tipples' burnings resulted from an illegal conspiracy between mine operators and agents of law enforcement to perpetrate violence themselves. conceal the source of the perpetration, and ultimately throw the blame therefor upon UMW (A. 21a).

The dissent points out with cogency that which the majority opinion ignored, namely, that "These motions and affidavits, however, were not met by counteraffidavits" and their factual allegations "stand before us (as they did before the District Judges) undenied" (A. 21a). Disagreeing with the majority's rejection of *Klapprott,* Circuit Judge Edwards points out that the final order in *Klapprott,* reported at 336 U.S. 942 (1949), orders "that the case be remanded to the District Court with a direction to *'receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate'* the judgment" (A. 22a). And, noting that Rule 43(e), Federal Rules, allows the taking of testimony and hearing when a motion contains allegations of facts not appearing in the record, the dissent's view is that UMW's motions herein under consideration "should be remanded to the District Judges, with instructions to take oral testimony on the motions and to determine whether or not there was probable cause to believe the charges contained therein" (A. 22a). Circuit Judge Edwards regarded the allegations of Kilburn as a fraud upon the court (A. 21a); the majority opinion disagreed (A. 17-18a), avowing the law did not allow an excursion to ascertain "something more about Kilburn's interesting affidavit" (A. 18a).

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's affirmance of the district court's holdings that UMW's motion fell within Federal Rule 60(b)(2) rather than subsection (6) thereof conflicts with this Court's principles enunciated and applied in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949).

Rule 60(b), Federal Rules of Civil Procedure (A. 23a), provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"; and while the Rule provides that a motion based upon subsection (2) be made "not more than one year after the judgment, order, or proceeding was entered or taken", subsection (6) of Rule 60(b) provides the court may relieve a party from a final judgment for "*any other reason justifying relief from the operation of the judgment*", in which event the one-year period has no relation thereto.

While *Klapprott* (335 U.S. 613) was concerned with the first subsection involving excusable neglect, which, like newly discovered evidence under subsection (2), it recites that one asserting grounds found in the first three subsections of Rule 60(b) must do so "not more than one year" after judgment and that the one-year limitation would control "*if no more than 'neglect' was disclosed*", (p. 613) and makes clear subsection (6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (p. 615). Hence, in *Klapprott*, this Court be-

lieved, under the circumstances disclosed by the petition, the judgment "should not be considered *only* under the excusable neglect, *but also under the 'other reason' clause* of 60(b), to which the one-year limitation provision does not apply" (p. 614).

Herein UMW's motions were not premised upon newly-discovered evidence *alone*, but also upon the circumstances, as the motion undeniably shows, that such evidence was not known to nor available to UMW until the one-year limitation of subsection (2) had elapsed and, further, that the nature of evidence contained in Kilburn's affidavit is of such type and character that persons with knowledge thereof would naturally keep secret, and thus preclude its availability to UMW.

Though these arguments were presented to the Sixth Circuit[10] by UMW, it is significant that the majority opinion offers no challenge to their validity and carefully avoids any mention of them.

Such failure is emphasized by the district court's statement (A. 2a) "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions." The Sixth Circuit's failure to take into account the circumstances noted is squarely in conflict with *Klapprott's* mandate that lower courts consider under subsection (6) those circumstances which occasion a delay beyond the one-year limitation applicable to the first three subsections in Rule 60(b). The majority's rejection of *Klapprott's* applicability herein, opposed by Circuit Judge Edwards' dissent (*ante*, pp. 10-11), results from its misconception of *Klapprott*.

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[10]*Sunfire* brief (No. 15,502) at page 12-13 and the *Price* brief (No. 15,503) at page 13.

II.

The Sixth Circuit has interpreted UMW's motion in a manner so as to be in conflict with, and render meaningless, the precise purpose for which subsection (6) of Rule 60(b) was adopted.

Moore and Vestal's Moore's Manual (1962), pp. 1924-25, states that Rule 60(b)(6) "is to cover unforeseen contingencies; intended to be a means for accomplishing justice in . . . exceptional situations" and "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief . . ."

Thus the circumstances upon which UMW relied to support its position emphasize the propriety of implementing subsection (6)'s provision, namely, for "any other reason justifying relief from the operation of the judgment". The majority opinion's obvious failure to consider such circumstances and to apply this Court's profession that "The integrity of the judicial process demands no less" than there be "a full exploration of where the truth lies" (*U.S.* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 241) shows the appropriateness and need for a review of the Sixth Circuit's opinion and judgment by the award of certiorari herein.

III.

The Sixth Circuit's judgment and decision herein conflict with its prior opinion in *L. M. Leathers' Sons* v. *Goldman*, 6 Cir., 252 F. 2d 188 (1958) wherein it expressly implemented the *Klapprott* rule.

Therein, an appellant brought an action in 1953 against appellee for a patent infringement. Following appellee's

answer and counterclaim, the parties agreed appellant would give appellee a free, non-exclusive, irrevocable license in return for appellee's dismissal of its counterclaim and stipulation of a consent judgment and injunction. Pursuant to the stipulation, judgment was entered *April* 26, 1964 and an injunction was issued pursuant to the judgment on *April* 28, 1954. However, no license was issued to appellee; and on *June* 14, *1955* appellee filed its motion which, revised on *November* 4, *1955*, asked the trial court, among other things, to set aside the injunction and judgment entered April 26, 1954 and to set an immediate trial of the action. The district court acquiesced and, in a new trial, dismissed the appellant's action. In an appeal to the Sixth Circuit, appellant complained the consent judgment and injunction were set aside more than a year and a half after entry of the judgment and service of the injunction; but the Sixth Circuit, pointing to *Klapprott,* approved the district court's action in setting aside the judgment and injunction and awarding a new trial, and declared that "Rule 60(b)(6) vests power in the court to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (252 F. 2d 190).

Though *L. M. Leathers' Sons* was relied upon by UMW in the Sixth Circuit, the majority opinion does not mention it and fails to state why it regarded the case as inapposite.

IV.

The Sixth Circuit's judgment and decision herein conflict in principle and result with *Radack* v. *Norwegian American Line Agency, Inc.,* 2 Cir., 318 F. 2d 538 (1963). Therein, plaintiff's action for damages arising out of injuries was dismissed for lack of prosecution; some *fifteen*

months after dismissal plaintiffs moved for, and the district court granted, an order vacating such dismissal; and defendants appealed. Noting that Rule 60(b)(6) "gives the district court a 'grand reservoir of equitable power to do justice in a particular case' ", the Second Circuit declared that (p. 542):

> "Had notice of the entry of judgment been given . . . plaintiffs would have been forewarned of the necessity of moving to vacate within one year if they wished to preserve the grounds on which they could most heavily rely, namely, counsel's inadvertence or *excusable neglect*. Rule 60(b) relief acts as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of his counsel's neglect . . . and we hold that it is available in a case such as this."

The Second Circuit made clear (p. 543) that "If no notice of the entry of judgment was ever received by appellees, the district court had the power to vacate the judgment", and it remanded the case for the purpose of affording the appellants the opportunity of showing that notice had been given. It declared (p. 543):

> *"But if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under Rule 60(b)(6)."*

V.

The Sixth Circuit's majority judgment and opinion are erroneous.

A crucial threshold observation is, as Circuit Judge Edwards' dissent notes, UMW's motions, affidavits and the factual allegations they contain stood before the Sixth Circuit and the district court, and now stand before this

Court, *undenied* (A. 21a). Hence, in accord with *Klapprott's* command, the Court "must accept as true the undenied allegations of the petitioner" (335 U.S. 604). Accord: *In re Cremidas Estate*, DC, Alaska, 1953, 14 F.R.D. 15; *Stevens* v. *Stoumen*, DC, E.D. Pa., 1963, 32 F.R.D. 385.

Likewise, the dissent notes, and correctly so, that both *in Sunfire* and *in Price* "many acts of violence, destruction and depredation were committed, most of them by unnamed and unidentified personages, but attributed by plaintiffs, and ultimately by the juries, to" UMW (A. 18a). In both cases, *as the motions recite*, and plaintiffs responses do not contradict, plaintiffs placed before the juries six or seven coal operators, each of whom related property damages at his (or her) mining operations but *without identifying any person connected with such activities*. The dissent states, in particular, that "two episodes of burnings at Ritchie's Tipples were the subject of testimony by Ritchie" in *Sunfire* and *Price* and that in relation to each, "the trial court charged in substance" that such testimony "could be considered by the jury as part of a pattern of violence which occurred" and "which plaintiffs attributed to" UMW (20a).

The dissent of Circuit Judge Edwards points out that, assuming the facts in Kilburn's affidavit fall within his personal knowledge, "we have the suggestion of a major conspiracy between mine operators and agents of law enforcement to perpetrate violence themselves, conceal the source of the perpetration, and ultimately throw the blame for that violence upon" UMW (A. 21a). Continuing, Circuit Judge Edwards declares that "Such an allegation is bound to represent either malicious perjury or suppressed truth" and that "The courts of this land are

not without power to deal with allegations like these, which really charge fraud upon the court" (A. 21a). In disagreement with the majority's rejection of *Klapprott's* applicability herein, the dissent directs attention that this Court's final order in that case, reported at 336 U.S. 942, required a remand to the district court to "receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate" the judgment (A. 22a).

Herein, where the district court, though denying the motions, conceded the pertinency and decisive effect of the facts alleged on the final judgment (A. 2a), the truth or falsity of the matters alleged in the Kilburn affidavit are as vital and crucial to a fair hearing and the according of justice to UMW as to the petitioner in *Klapprott.*

Indeed, Kilburn's affidavit indicates that acts of violence were committed *on a wide-scale basis.* It specifically identified persons who burned "Ritchie's Tipple at Viper, Kentucky"; and it recites that "Ritchie's Tipple at Sassafras, Kentucky was burned by Ritchie's guards" (8a). In light of the expansive program of destruction recited in the Kilburn affidavit (A. 13a) in which persons are identified (none of whom are UMW agents, as William Perkins' affidavit recites and plaintiffs' responses do not deny), the juries could believe that answers to the inquiry as to who had committed the acts for which UMW has been held liable in each of *Sunfire* and *Price* are to be found in the activities of persons named in Kilburn's affidavit and that the wrongful conduct attributed to UMW was perpetrated by persons so identified by Kilburn. Clearly, under the circumstances of these cases, jury findings of UMW liability, based upon inferences, as the findings therein are, could not be regarded as either warranted or fair unless opportunity be given the juries

to have such knowledge, and should the juries believe that those persons named or identified by Kilburn burned the tipples, the juries' further belief and inferences that such persons also committed the other acts of violence would be as reasonable (if not more so since no UMW agent has been named) as believing that UMW agents did so, particularly when no evidence identifies any UMW member or agent.

The burden of proving UMW responsibility and liability rested upon plaintiffs in both *Sunfire* and *Price*. In the absence of plaintiffs' ability to identify those responsible for the acts of depredation, the evidence relating to matters in Kilburn's affidavit, if proved, becomes most pertinent in view of the Sixth Circuit's rule that "A verdict should be directed against the party upon whom rests the burden of proof, where from the evidence the injury claimed could with equal probability have resulted from a cause upon which liability could not be predicated." *Troutman* v. *Mutual Life Ins. Co. of N.Y.*, 6 Cir., 125 F. 2d 769, 773. Cf. *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, which rejects a verdict based upon speculation.

Only by setting aside the final judgment and order entered by the district court, by its awarding UMW a new trial, and by its permitting a jury to consider evidence therein based upon the affidavit's recitals may it be said that a fair trial has been had in this case. Where, as herein, plaintiffs introduced and employed what they themselves admit is only circumstantial evidence to impute responsibility and liability upon UMW, and there is a post-judgment discovery of evidentiary matter which was not available because of its naturally secretive character and which could serve as a basis for jury belief that persons without legal relationship to UMW committed

the wrongful acts, thus exculpating UMW to which has been imputed responsibility when no UMW agent has been named, the need "for a full exploration of where the truth lies" is as vital herein as in *Shotwell* (*ante*, p. 14).

Here such evidence, as the motion shows, was not available to UMW until more than one year after judgment was entered against UMW, when, *on March 22, 1963*, the affidavit's existence and its contents were announced publicly over a radio station after it was filed in a hearing on charges against Kilburn. Further, it was evidence of such type and character that persons with knowledge thereof would naturally keep it secret, thereby precluding its availability to UMW. Thus, the circumstances of the case, as already pointed out, and the nature of the evidence, which the Kilburn affidavit indicates, invoke the provisions of Rule 60(b)(6), Federal Rules of Civil Procedure, which permits the relief for "any other reason justifying relief from the operation of the judgment" and, as already noted, under subsection (6) courts are vested with power "to enable them to vacate judgments whenever such action is appropriate to accomplish justice". *Klapprott* v. *U.S.*, 335 U.S. 615.

The majority opinion (A. 12a) stresses that Kilburn's affidavit was prepared on August 10, 1962 by H. B. Noble (one of UMW's attorneys in the main cases). Noble's affidavit recites the *consultation with Kilburn was on a professional basis as attorney and client* and on Kilburn's request "prior to the preparation of the affidavit, that" Noble "keep secret that which he desired to make known to me" and that "with this understanding", Noble prepared the affidavit (10-11a). Noble's affidavit further recites he "maintained the trust" and "the same

was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4) [10-11a], which provides that "No attorney shall testify concerning a communication made to him, in his professional character, by his client or his advice thereon, without the client's consent; . . ."

The circumstances set forth in the motion to vacate invite the exercise of the "grand reservoir of equitable power to do justice" in this case which the authorities show to be vested in district courts. The majority's failure to do so demonstrates its error in holding that subsection (6) is inapposite.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decisions and judgments of the Sixth Circuit, entered in Cases No. 15,502 and No. 15,503, as aforesaid (*ante*, pp. 1-2) on August 20, 1964.

Respectfully submitted,

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